Silvers v. Google, Inc. Doc. 11

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CASE NO. 1:06-CV-02658-WMN

US District Court for the
Southern District of Florida
West Palm Beach Division

Case No. 05-80387-CIV-
RYSKAMP/VITUNAC

STEVEN A. SILVERS, an individual,

Plaintiff,

v.

GOOGLE INC., a Delaware corporation,

Defendant.
_______________________________________/

GOOGLE INC., a Delaware corporation,

Counterclaimant,

v.

STEVEN A. SILVERS, an individual;
STELOR PRODUCTIONS, INC., a Delaware
Corporation; STELOR PRODUCTIONS, LLC, a
Delaware limited liability company, and
STEVEN ESRIG, an individual,

Counterdefendants.
_______________________________________/

STELOR PRODUCTIONS, LLC'S MOTION TO COMPEL LINDSEY MILLER'S COMPLIANCE WITH SUBPOENA AND COURT ORDER

Stelor Productions, LLC ("Stelor"), by and through undersigned counsel, hereby moves for entry of an order requiring Lindsey Miller to comply with the Court's November 29, 2006 Order, which denied Ms. Miller's Motion to Quash Subpoena and for Protective Order, and ordered her immediately to comply with Stelor's Subpoena Duces Tecum:

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INTRODUCTION

Stelor has been attempting since September of 2006 to obtain documents and deposition testimony from Ms. Miller, a potential witness in connection with Stelor's pending action in the Southern District of Florida. Ms. Miller, through counsel, however, has engaged in an ongoing effort to avoid compliance. Indeed, they fail even to engage in good faith in basic communications that would likely enable the resolution of the scheduling issues raised by Ms. Miller.

Thus, even though Ms. Miller's initial Motion to Quash was denied and she was ordered to comply with the Subpoena, she has failed and refused to do so. She has produced no documents; she indicates that she will not appear for deposition on December 19, 2006 (the date noticed by Stelor); and her counsel refuses to provide alternative dates for the scheduling of that deposition.

Counsel for Stelor has made repeated efforts to communicate with counsel for Ms. Miller to resolve these issues, as detailed below. Those efforts, however, have been essentially ignored. Accordingly, Stelor has no choice but to address the issue with the Court, and request entry of an order again compelling Ms. Miller to appear for deposition and produce the subpoenaed documents, either on December 19, 2006 as noticed, or some alternative date certain.

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PROCEDURAL HISTORY

Stelor issued a Subpoena Duces Tecum on September 22, 2006, requiring Ms. Miller to testify and produce documents. Ms. Miller refused to do so, instead filing a Motion to Quash and for Protective Order.

On November 29, 2006, this Court issued a Memorandum and Order denying the Motion, and ordering Ms. Miller to comply with the Subpoena. (DE's ## 8 & 9).

Notwithstanding the Court's Order, however, Ms. Miller has failed and refused to comply. She has produced no responsive documents, and she has advised through counsel that she refuses to appear for deposition.

STELOR'S EFFORTS TO FACILITATE MS. MILLER'S COMPLIANCE

After Ms. Miller and her counsel failed to respond to the Court's Order, counsel for Stelor re-noticed the deposition for December 19, 2006, and filed a copy of the notice with this Court (DE # 9). The date was selected after coordination with counsel for the parties in the Florida Action, for which the deposition is being taken. The date was specifically cleared with counsel for Mr. Silvers – the defendant in the Florida action. *See* Exhibit "J" hereto. Mr. Silvers, though, is also a defendant in the state court action in Maryland, where he (along with Ms. Miller) is represented by Mr. Worsham. Thus, it was the understanding of counsel for Stelor that Mr. Silvers' Florida counsel was in communication with Mr. Worsham, with whom the date was cleared as well.

The deposition notice was issued in the Florida Action on December 1, 2006. In addition, a cross-notice for Ms. Miller's deposition in the Maryland state court action was faxed to Mr. Worsham on or about December 1, 2006. *See* Exhibit "A" hereto. Clearly, therefore, Ms.

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Miller and her counsel were well aware of the December 19th deposition weeks before the scheduled date.

A copy of the notice of deposition issued in the Florida Action was subsequently filed with this Court (DE # 10) on December 11, 2006, and counsel for Ms. Miller was served electronically. In addition, counsel for Stelor forwarded a copy of the notice to Ms. Miller's counsel by email. *See* Exhibit "B" hereto. The email advised that counsel for Stelor would be traveling from Miami for the deposition, and asked for confirmation from Mr. Worsham that the deposition would proceed.

Mr. Worsham did not respond.

Counsel for Stelor sent a follow-up email on December 12, 2006. *See* Exhibit "C" hereto. Counsel for Stelor also called Mr. Worsham and left voice mail messages, and sent yet another email late in the day on December 12, 2006. *See* Exhibit "D" hereto.

Finally, Mr. Worsham responded by email on December 13, 2006, advising that he had "mailed" the notice to his client and could not yet confirm she would appear for deposition. *See* Exhibit "E" hereto. In addition, Mr. Worsham left counsel for Stelor a voice mail, advising that he was unwilling to speak with counsel by phone, and preferred all communications to be in writing.

Counsel for Stelor responded by email that same afternoon, *see* Exhibit "F" hereto, reiterating that Ms. Miller was required to produce documents and appear for deposition pursuant to the Subpoena and the Court's Order. Counsel for Stelor questioned why the notice had only been mailed to Ms. Miller, and why Mr. Worsham had not attempted to contact his client by

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phone or email. Additionally, counsel for Stelor offered to set the deposition on a reasonable alternative date, if Mr. Worsham provided one.

Mr. Worsham emailed back the following day, indicating – although not definitively – that his client would not appear for the deposition. *See* Exhibit "G" hereto. Thus, the email states: "I presume you will not be attempting to depose Ms. Miller, and again suggest you not plan on deposing Ms. Miller on Dec. 19, 2006." The email further advised that Mr. Worsham would be unavailable to discuss the matter until Monday, December 18, 2006 – the day before the scheduled deposition. Still, Mr. Worsham offered no alternative dates.

Counsel for Stelor made two further attempts to address the situation with Mr. Worsham. First, by email sent late in the day on December 14, 2006, counsel for Stelor asked for a clear indication from Mr. Worsham as to whether or not Ms. Miller would be appearing for deposition on December 19th. *See* Exhibit "H" hereto. Second, by email sent this morning, December 15, 2006, Counsel for Stelor made one more attempt to resolve in good faith any issues related to the deposition, offering to reschedule it if Mr. Worsham provided a reasonable alternative date. *See* Exhibit "G" hereto. Mr. Worsham has not responded.

Counsel for Stelor is scheduled to travel to Maryland on Monday, December 18, 2006 in order to take the deposition on the 19th, as noticed.

REQUESTED RELIEF

WHEREFORE, Stelor respectfully requests that this Court enter an order compelling Ms. Miller to appear for deposition and produce all responsive documents on December 19, 2006 as noticed, or on an alternative date certain subject to availability of Stelor's counsel. In addition, Stelor requests that sanctions be assessed against Miller and her counsel for the costs associated

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with Stelor's preparation of this Motion, and for such other and further relief as this Court deems appropriate.

LOCAL RULE 104(7) & (8) CERTIFICATE

Undersigned counsel hereby certifies that he has attempted to confer with counsel for Ms. Miller as detailed above on pages 3-5 of this Motion and through the communications attached hereto as Exhibits, in an effort to resolve the issues raised by this Motion. The efforts have been unsuccessful. The issue that requires resolution by this Court is compelling Ms. Miller to produce documents and appear for deposition pursuant to the Subpoena on a date certain.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2006, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Kevin C. Kaplan
Kevin C. Kaplan

SERVICE LIST

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UNITED STATES DISTRICT COURT, DISTRICT OF MARYLAND

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